



## DEPARTMENT OF HOMELAND SECURITY

[CIS No. 2725-22; DHS Docket No. USCIS-2023-0001]

**RIN 1615-ZB97**

### Notice of EB-5 Regional Center Integrity Fund Fee

**AGENCY:** U.S. Citizenship and Immigration Services, Department of Homeland Security.

**ACTION:** Notice of integrity fund fee.

**SUMMARY:** The U.S. Citizenship and Immigration Services (USCIS) is announcing a fee to be collected by USCIS. The EB-5 Reform and Integrity Act of 2022 (the 2022 Act) requires USCIS to establish a special fund to be known as the EB-5 Integrity Fund to be primarily used by USCIS in the administration of the Regional Center Program. USCIS must collect a fee of \$20,000 or \$10,000, depending on certain factors established by the 2022 Act, to finance the EB-5 Integrity Fund from each designated regional center. This notice explains how regional centers should determine the amount of the fee and provides the process for how it is to be paid.

**DATES:** The first fee payment of the fees announced in this notice must be paid beginning on [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER] and before [insert date 30 days after date of publication in the Federal Register]. For fiscal year 2024 and each year thereafter, the fees must be paid between October 1st and October 31st of the same year.

**FOR FURTHER INFORMATION CONTACT:** Charles L. Nimick, Chief, Business and Foreign Workers Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security, 5900 Capital Gateway Drive, Camp Springs, MD 20588-0009, telephone (240) 721-3000 (this is not a toll-free number). Individuals with hearing or speech impairments may access the telephone number above via TTY by calling the toll-free Federal Information Relay Service at 1-877-889-5627 (TTY/TDD).

### SUPPLEMENTARY INFORMATION:

Table of Abbreviations

DHS—Department of Homeland Security

INA—Immigration and Nationality Act

USCIS—U.S. Citizenship and Immigration Services

## **I. Background and Authority**

### *A. EB-5 Reform and Integrity Act of 2022*

On March 15, 2022, the President signed into law the EB-5 Reform and Integrity Act of 2022 (the 2022 Act), Div. BB of the Consolidated Appropriations Act, 2022, Pub. L. 117-103. Among other things, the 2022 Act immediately repealed the former authorizing statutory provisions under the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act 1993, Pub. L. 102-395, 106 Stat. 1828, § 610, and added new authorizing provisions to the Immigration and Nationality Act, substantially reforming the Regional Center Program effective May 14, 2022. The reformed Regional Center Program is authorized through September 30, 2027.

The Regional Center Program makes visas available to qualified immigrants (and the eligible spouses and children of such immigrants) who pool their investments with other qualified immigrants in a “regional center” in the United States. *See* INA section 203(b)(5)(E), 8 U.S.C. 1153(b)(5)(E). USCIS designates regional centers based on a proposal for the promotion of economic growth, including prospective job creation and increased domestic capital investment in their requested geographic region. *Id.*

### *B. EB-5 Integrity Fund*

The 2022 Act establishes a special fund to be known as the EB-5 Integrity Fund (the Fund). INA section 203(b)(5)(J), 8 U.S.C. 1153(b)(5)(J). The fund is to be used by DHS for the following:

(1) Conducting investigations based outside of the United States, including monitoring and investigating program-related events and promotional activities and ensuring that an alien

investor's funds associated with the alien's investment were obtained from a lawful source and through lawful means;

(2) Detecting and investigating fraud or other crimes;

(3) Determining whether regional centers, new commercial enterprises, job-creating entities, and alien investors (and their alien spouses and alien children) comply with U.S. immigration laws;

(4) Conducting audits and site visits; and

(5) For other purposes as the Department of Homeland Security (DHS) determines necessary.

INA section 203(b)(5)(J)(iii), 8 U.S.C. 1153(b)(5)(J)(iii).

## **II. Integrity Fund Fee**

### *A. Annual Fee.*

The 2022 Act requires the Fund to be financed through the collection of an annual fee paid by and collected from designated regional centers (Integrity Fund Fee).<sup>1</sup> INA section 203(b)(5)(J)(ii), 8 U.S.C. 1153(b)(5)(J)(ii). USCIS recognizes that the 2022 Act required it to collect the first fee by October 1, 2022 and impose penalties for fees not paid by October 31, 2022. USCIS is working to implement the statutory mandates as soon as practicable. While that work is ongoing, and in an effort to implement the plain terms of the 2022 Act as quickly as possible, USCIS will begin collecting the fee for fiscal year 2023, which under the 2022 Act would have been due on October 1, 2022, on [insert date of publication in the Federal Register]. USCIS will accept payment of the fee, as required by the statute, for 30 days. For fiscal year 2024 and each year thereafter, such fees are required to be paid between October 1st and October 31st of the same year. *Id.*

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<sup>1</sup> Beginning on October 1, 2022 and in accordance with Form I-526E, Immigrant Petition by Regional Center Investor, filing instructions on the USCIS website, USCIS began collecting a \$1,000 Integrity Fund Fee with each new immigrant investor petition filed by a regional center investor for the Fund. INA section 203(b)(5)(J)(ii)(II), 8 U.S.C. 1153(b)(5)(J)(ii)(II).

Section 102 of the Homeland Security Act of 2002 and section 103 of the INA, 8 U.S.C. 1103, generally charge DHS with the administration and enforcement of the immigration and naturalization laws of the United States.<sup>2</sup> The INA further authorizes DHS to “establish such regulations; prescribe such forms of bond, reports, entries, and other papers; issue such instructions; and perform such other acts as he deems necessary for carrying out his authority under the provisions of” the INA.<sup>3</sup> In the Homeland Security Act of 2002, Congress also provided that DHS “shall be responsible for . . . [e]stablishing national immigration enforcement policies and priorities.”<sup>4</sup> The Homeland Security Act also provides that DHS, in carrying out its authorities, must “ensure that the overall economic security of the United States is not diminished by efforts, activities, and programs aimed at securing the homeland.”<sup>5</sup>

DHS is directed to set national immigration enforcement policies and priorities, and as such, is ultimately accountable for appropriately using the resources available to the Department as a whole and for taking a comprehensive view of the enforcement landscape.

The 2022 Act sets the standard annual fee at \$20,000 for each designated regional center. However, for those with “20 or fewer total investors in its new commercial enterprises” during the preceding fiscal year (October 1 – September 30), the annual fee is reduced to \$10,000. *Id.*

At this time, given the statutory mandate to collect the fees beginning on October 1, 2022, and limited agency resources, USCIS is utilizing its discretion to set an enforcement policy for how it will evaluate whether a regional center has appropriately counted the number of its total investors and thus paid the correct fee. As a general matter, USCIS adjudicators will evaluate on a case-by-case basis how many investors a regional center has in any given fiscal year. However, adjudicators will engage in that case-by-case analysis with the understanding that, generally speaking, the number of investors for purpose of calculating the fee to be paid will

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<sup>2</sup> Public Law 107-296, sec. 102(a)(3), 116 Stat. 2135, 2143 (codified at 6 U.S.C. 112(a)(3)); Public Law 82-414, 66 Stat. 163 (as amended); INA sec. 103(a)(1), 8 U.S.C. 1103(a)(1).

<sup>3</sup> INA sec. 103(a)(3), 8 U.S.C. 1103(a)(3).

<sup>4</sup> Public Law 107-296, sec. 402(5), 116 Stat. 2135, 2178 (codified at 6 U.S.C. 202(5)).

<sup>5</sup> 6 U.S.C. 111(b)(1)(F).

be the total number of EB-5 investors who have invested (or are actively in the process of investing) in all of the regional center's new commercial enterprises in the respective fiscal year. This policy is drawn as closely to the plain statutory language as possible and is in line with the general understanding of the term "investors" by EB-5 stakeholders.

Although "investor" is not specifically defined for purposes of INA section 203(b)(5), 8 U.S.C. 1153(b)(5), it is used extensively throughout that section to refer to noncitizens seeking classification, or classified, under INA section 203(b)(5) 8 U.S.C. 1153(b)(5) (i.e. I-526 and I-526E petitioners). For purposes of INA section 216A, "alien investor" is defined as "an alien who obtains the status of an alien lawfully admitted for permanent residence (whether on a conditional basis or otherwise)" under INA section 203(b)(5), 8 U.S.C. 1153(b)(5). *See* INA 216A(f)(1), 8 U.S.C. 1186b(f)(1).

USCIS recognizes that there is no legal requirement that an investor remain invested in an NCE within a specific time period after they file their Form I-829, *Petition by Investor to Remove Conditions on Permanent Resident Status*, and thus has determined that the filing of the Form I-829 generally would be an appropriate demarcation for purposes of determining the number of "total investors in the preceding fiscal year." Based on INA sections 203(b)(5) and 216A(f)(1), USCIS generally considers an individual to be an investor from the point of filing a petition for classification (Form I-526, Immigrant Petition by Alien Entrepreneur, or Forms I-526E, Immigrant Petition by Regional Center Investor) through the point of filing a petition for removal of conditions (Form I-829, Petition by Investor to Remove Conditions on Permanent Resident Status). This is also the general understanding of the term amongst EB-5 stakeholders.<sup>6</sup> Thus, subject to additional considerations described below, USCIS intends to estimate the approximate number of total investors in a regional center in any given fiscal year by subtracting

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<sup>6</sup> See, e.g., EB-5 Diligence, Answers to Common EB-5 Visa Investor Questions ( Apr. 26, 2021), *available at* <https://www.eb5diligence.com/articles/common-eb-5-investor-questions> (explaining that an investor's capital goes into an NCE, the "at risk" requirement lasts the "duration of the immigrant investor's conditional residency", and if USCIS denies the petition for ineligibility, "all the NCE's investors ... would then have to start the investment process all over with a new I-526 filing and EB-5 investment.").

the number of Forms I-829 associated with the regional center filed at any time on or before September 30 of that fiscal year (including filings from prior fiscal years) from the total number of pending and approved Forms I-526, *Immigrant Petition by Standalone Investor*, associated with the regional center (filed on or before June 30, 2021) and Forms I-526E, *Immigrant Petition by Regional Center Investor*, (filed on or after June 1, 2022 (the date USCIS published the form)) associated with the regional center filed at any time on or before September 30 of that same fiscal year (including filings from prior fiscal years). A Form I-829 that is filed separately by a spouse or child of an investor that obtained conditional permanent resident status based on their relationship to the investor and was not included on the principal investor's Form I-829 may typically be excluded from the total investor calculation. For example, if a regional center had 30 associated Form I-526 petitions, 10 associated Form I-526E petitions and 20 associated Form I-829 petitions filed on or before September 30, 2022, USCIS generally would estimate that the regional center has 20 total investors in its new commercial enterprises for fiscal year 2022 (FY22) for purposes of calculating the applicable Integrity Fund fee for fiscal year 2023 (FY23) and would likely owe the reduced fee amount of \$10,000, subject to additional considerations described below.

USCIS recognizes that there may be alternative methods of calculating "total investors" and has considered potential reliance interests in arriving at this interpretation. As this is an entirely new statutorily created and mandated fee, and USCIS thus has not previously enforced this requirement, USCIS believes that regional centers likely do not have appreciable reliance interests that favor a given interpretation. USCIS emphasizes that the method of approximating investors described above is meant to be a general guide to USCIS adjudicators in this calculation. USCIS adjudicators retain discretion to evaluate the Integrity Fund fee due and the number of investors on a case-by-case basis, accounting for any other facts or evidence in the record in the totality of the circumstances, including any evidence provided by a regional center that believes it has greater or fewer total investors.

USCIS considered alternative methods of calculating when a noncitizen generally would no longer be deemed an “investor”; however, those options generally would either not capture the entire population or involve manual calculations that USCIS believes would place an unreasonable burden on the Agency’s limited resources as USCIS works to implement the 2022 Act. Additionally, those options might be confusing and burdensome to the investor or regional center populations. For example, USCIS considered generally counting only the Forms I-526 that were filed within two years of the applicable period used for determining the EB-5 Integrity Fund fee given the expected two-year minimum timeframe for the investment, or sustainment period, under the 2022 Act. INA section 203(b)(5)(A)(i); 8 U.S.C. 1153(b)(5)(A)(i). However, that would likely be underinclusive given that many investors are actively in the process of investing (i.e. not yet fully invested) when they file their Form I-526 petition as permitted under applicable requirements and, additionally, would not align with the sustainment period for those who filed prior to the 2022 Act, which runs approximately to the point of the Form I-829 filing, regardless of when they filed their Form I-526 or made their investment. For Form I-526 petitions filed after the 2022 Act, USCIS also considered generally counting only Form I-526 petitions whose investments were still within the two-year period of investment expected under INA 203(b)(5)(A)(i); however, manual verification of the time period of investment for each regional center investor, rather than conducting a systems inquiry for total petition filings, would exhaust valuable and significant USCIS resources that the agency believes, in the balance, are better utilized in service of other adjudicatory priorities. USCIS acknowledges the practical limitations of determining how many “total investors” may be in a new commercial enterprise during any given fiscal year to ensure that the correct fee is paid. We believe the general method we are announcing in this notice, subject to case-by-case analysis, reflects both a reasonable interpretation of the statute and ensures that USCIS’ limited resources are used most efficiently to ensure compliance with the 2022 Act.

*B. Fee Payment Process.*

Before [insert date 30 days after date of publication in the Federal Register], and between October 1 and October 31 of each following year (FY 2024 onward), each designated regional center must pay the fee to USCIS online via the online form hosted on Pay.gov at Pay.gov - EB5 - Annual Fee for Regional Center. Payment of this fee must be made by an authorized individual on behalf of a regional center. Each designated regional center must pay the fee with either a valid credit or debit card or by authorizing an ACH Debit transaction where the regional center provides its U.S. bank routing and checking account numbers to have money debited directly from its U.S. bank account. Please note that the U.S. Department of Treasury guidelines permit USCIS to accept a maximum payment amount of \$24,999 from one credit card in one day, and a single obligation cannot be split into multiple credit card payments over multiple days in order to evade this limit.<sup>7</sup>

The 2022 Act and this notice represent the constructive notice to designated regional centers of the amount they owe and when it is due. USCIS will also post information on its website and issue a press release but will not send an invoice to the regional centers beyond this notice. Each regional center is responsible for determining their amount owed based on the number of total investors and for submitting the appropriate fee before the due date. If a regional center is required to provide evidence of payment of this fee, USCIS will accept proof that the fee is paid in the form of, for example, a copy of the Pay.gov payment confirmation email or a notice or statement from the payer's credit card issuer or financial institution.

### *C. Late Fee.*

The 2022 Act requires DHS to impose a reasonable penalty fee (to be paid to USCIS and deposited into the Fund when collected) on a regional center that does not pay the annual Integrity Fund fee within 30 days after the date on which such fee is due. INA section

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<sup>7</sup> See U.S. Department of the Treasury, Bureau of the Fiscal Service, Treasury Financial Manual, Chapter 7000, section 7055.20, available at <https://tfm.fiscal.treasury.gov/v1/p5/c700#:~:text=Federal%20entities%20must%20limit%20their,are%20no%20more%20than%20%2410%2C000.00> (last viewed Oct. 12, 2022).



203(b)(5)(J)(iv), 8 U.S.C. 1153(b)(5)(J)(iv). USCIS must terminate the designation of any regional center that does not pay the fee within 90 days after the date on which such fee is due. *Id.*

DHS has decided, in exercising its discretionary enforcement authority articulated above, that USCIS will not charge the late penalty in 2022 for the following reasons: (1) the Fund and Integrity Fund fee are new program requirements; and (2) USCIS must determine an amount that is a “reasonable” penalty to charge. Therefore, DHS has decided and USCIS is announcing that, as a matter of discretionary enforcement policy, we will not charge a late fee until we take further action to set the amount of the late fee, as well as the process for collecting the late fee.

However, USCIS will, as authorized by the 2022 Act, terminate the designation of any regional center that does not pay the full fee within 90 days after the date on which such fee is due (i.e., a regional center does not make payment, or a regional center pays \$10,000 when it owes \$20,000). Termination will not be automatic and USCIS will provide a notice of intent to terminate and the opportunity for a regional center to prove that the fee was paid in the proper amount by the due date before sending a notice of termination. Again, USCIS recognizes that the 2022 Act requires collection of the fee on October 1, 2022 and imposition of termination after 90-days. Because this notice published after October 1, 2022, USCIS will maintain the statutory 90-day termination period and will not begin taking steps to terminate a regional center until [insert date 90 days after date of publication in the Federal Register]. For all subsequent years, USCIS will take steps to terminate the regional center if the regional center does not pay the full fee by December 31st.<sup>8</sup>

### **III. Regulatory Requirements.**

#### *A. Administrative Procedure Act.*

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<sup>8</sup> The 2022 Act provides that DHS may increase the annual Integrity Fund fee as necessary to ensure that the Fund is sufficient to carry out its purposes. INA section 203(b)(5)(J)(ii)(III), 8 U.S.C. 1153(b)(5)(J)(ii)(III). DHS may increase the amount of the Integrity Fund fees through future regulations if the collections are inadequate.

DHS and USCIS are taking this action without prior notice and opportunity for comment because this document is a general statement of policy supported by its discretionary enforcement authority and an interpretive rule. 5 U.S.C. 553(b)(A) (notice and comment requirements do not apply to “general statements of policy” and “interpretive rules”).

The Homeland Security Act authorized the Secretary with “[e]stablishing national immigration enforcement policies and priorities.”<sup>9</sup> In accordance with these authorities, and in attempting to quickly effectuate as much of the 2022 Act’s statutory requirements as possible, DHS is exercising its discretionary authority to explain how it will evaluate whether a regional center has paid the correct fee, and will not impose a reasonable penalty fee on a regional center that does not pay the annual Integrity Fund fee within 30 days until it can pursue additional rulemaking. The Supreme Court explained in *Heckler v. Chaney*, 470 U.S. 821, 831–32 (1985), that “an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise...we note that when an agency refuses to act it generally does not exercise its *coercive* power over an individual's liberty or property rights.” DHS has balanced the impact to the public of imposing a “reasonable penalty,” the timeliness of complying with the statutory mandates, and the agency delays in providing notice to regional centers regarding how to submit the fee. Ultimately, DHS decided that the discretionary policy of non-enforcement presented in this Notice was the most equitable path forward.

Alternatively, this agency action is an interpretive rule. Whether a rule is legislative or interpretive turns on “the prior existence or non-existence of legal duties and rights.” *Am. Mining Congr. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1110 (D.C. Cir. 1993). *See, e.g., United Tech. Corp. v. EPA*, 821 F.2d 714, 719-20 (D.C. Cir. 1987) (“[W]hat distinguishes interpretative from legislative rules is the legal base upon which the rule rests. If the rule is based on specific statutory provisions, and its validity stands or falls on the correctness of the agency’s interpretation of those provisions, it is an interpretative rule. If, however, the rule is based on an

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<sup>9</sup> Public Law 107-296, sec. 402(5), 116 Stat. 2135, 2178 (codified at 6 U.S.C. 202(5)).

agency’s power to exercise its judgment as to how best to implement a general statutory mandate, the rule is likely a legislative one.”). By law, USCIS is required to collect the Integrity Fund Fee on an annual basis. *See* INA section 203(b)(5)(J)(ii), 8 U.S.C. 1153(b)(5)(J)(ii). The statutory provision that requires the \$20,000 and \$10,000 fees contains little ambiguity for USCIS to resolve or explain:

(I) ANNUAL FEE.—On October 1, 2022, and each October 1 thereafter, the Secretary of Homeland Security shall collect for the Fund an annual fee—

(aa) except as provided in item (bb), of \$20,000 from each regional center designated under subparagraph (E); and

(bb) of \$10,000 from each such regional center with 20 or fewer total investors in the preceding fiscal year in its new commercial enterprises.

INA section 203(b)(5)(J)(ii)(I), 8 U.S.C. 1153(b)(5)(J)(ii)(I). To the extent that there is minimal ambiguity regarding the calculation of “total investors” because the statute does not explicitly include a calculation, USCIS’s interpretation is only intended to guide adjudicators in the performance of their duties and not remove their discretion in making adjudicatory decisions. This interpretation does not create any substantive or procedural right or benefit that is legally enforceable, because the fees are explicitly provided for in statute; but rather provides notice to the public regarding this explicit statutory fee requirement. USCIS imposes no additional duties or rights, beyond what the 2022 Act has already imposed.

Therefore, USCIS is imposing this fee without soliciting public comment prior because this is a general statement of policy and an interpretive rule exempt from notice and comment procedures. 5 U.S.C. 553(b)(A).

#### *B. Other Regulatory Requirements*

Because this action is not subject to the notice-and-comment requirements under the Administrative Procedure Act, a final regulatory flexibility analysis is not required. *See* 5 U.S.C. 604(a). In addition, this notice is not a “major rule” as defined by the Congressional Review Act,

5 U.S.C. 804(2), and thus is not subject to a 60-day delay in the rule becoming effective. This action is not subject to the written statement requirements of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104-4). Nor does it require prior consultation with State, local, and tribal government officials as specified by Executive Orders 13132 or 13175. This notice also does not require an Environmental Assessment (EA) or Environmental Impact Statement (EIS). *See* 40 CFR 1507.3(b)(2)(ii) and 1508.4. This action does not affect the quality of the human environment and fits within Categorical Exclusion number A3(d) in Dir. 023-01 Rev. 01, Appendix A, Table 1, for rules that interpret or amend an existing regulation without changing its environmental effect.

This notice does not require review by the Office of Management and Budget (OMB) under Executive Order 12866. As previously discussed, USCIS is required to collect the Integrity Fund Fee. Nonetheless, for illustrative purposes Table 1 shows the total number and aggregate amount of Integrity Fund Fees that USCIS estimates it will receive in 2022.

TABLE 1: 2022 Projected Integrity Fund Fees

SIZE OF RC	Number	Fee in \$	Total in \$
> 20 investors	246	\$20,000	\$4,920,000
<= 20 investors	384	\$10,000	\$3,840,000
TOTAL	630		\$8,760,000

Finally, this notice and the Integrity Fund Fees are not subject to the Paperwork Reduction Act, 44 U.S.C. 3501 – 3521 (PRA). The PRA does not preclude the imposition of a penalty on an entity for failing to comply with a collection of information that is imposed on the entity by statute as is the case with the Integrity Fund Fees. *See* 5 CFR 1320.6(e).

**Ur M. Jaddou,**  
*Director.*